APPENDIX A.

United States Court of Appeals
For the District of Columbia Circuit.

No. 20027.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Appellants,

v.

National Mediation Board, et al., Appellees.

Appeal from the United States District Court for the District of Columbia.

Decided May 31, 1966.

Mr. Herbert S. Thatcher, with whom **Messrs. David Previant, David S. Barr** and **Jules Bernstein** were on the brief, for appellants.

Mr. John C. Eldridge, Attorney, Department of Justice, with whom **Assistant Attorney General Douglas** and **Mr. Morton Hollander**, Attorney, Department of Justice, were on the brief, for appellee, National Mediation Board.

Mr. James L. Highsaw, Jr., with whom **Mr. Edward J. Hickey, Jr.**, was on the brief, for appellee, Brotherhood of Railway and Steamship Clerks.

Before Wilbur K. Miller, **Senior Circuit Judge**, and **Fahy and Tamm**, Circuit Judges.

Per Curiam: The appeal is from an order of the District Court granting the motion of the National Mediation Board for summary judgment on a suit brought against the Board by the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, here the Teamsters, and George Leonidas, appellants. They sued to prevent the holding of an election, under the Railway Labor Act, of a collective bargaining agent among employees of REA Express, Inc. The District Court denied preliminary injunctive relief sought by appellants. This court and thereafter the Chief Justice of the United States declined to stay the action of the District Court or to enjoin the election or certification. In due course the case has reached this court for decision on the merits after the election was held and the Brotherhood of Railway Clerks, the Teamsters' rival labor organization in the election, was certified as the representative of the employees.

The contention of appellants is that the manner in which the Board scheduled the election deprived the Teamsters of an adequate opportunity effectively to campaign among the employees, especially as the collective bargaining unit fixed by the Board embraced a large number of employees theretofore represented by the Railway Clerks and among whom previous organizing efforts had not been made on behalf of the Teamsters. It is accordingly urged that the Teamsters were deprived of their constitutional rights protected, primarily, by the First Amendment. The contention is sought to be supported by allegations not only of insufficient time to reach the employees in general but by faulty addresses furnished by the Board for some of the employees.

Appellants are faced with the well-established limitations upon judicial review of employee representation proceedings conducted by the Board under the Railway Labor Act. See **Switchmen's Union v. National Mediation Board**, 320 U. S. 297; **Railway Clerks v. Employees Ass'n**, 330 U. S. 650; **Flight Engineers' International Ass'n v. National Mediation Board**, 119 U. S. App. D. C. 171, 338 F. 2d 280.

To sustain the constitutional challenge the burden of demonstration is a heavy one.

The proceedings were pending for some months and we cannot say on the record before us that the Teamsters were so severely deprived of campaign opportunities—matters largely intangible—that we are required to hold, contrary to the judgment of the Board, that constitutionally protected rights were infringed.

Affirmed.

APPENDIX B.

United States Constitution:

First Amendment:

Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Railway Labor Act, U. S. Code, Title 45, Chapter 8:

Section 2, Fourth:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny

or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall

treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

APPENDIX C.

United States Court of Appeals for the
District of Columbia Circuit,
September Term, 1965.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Appellants,

v.

National Mediation Board, et al., Appellees.

No. 19,737.

Before: Fahy, Danaher, and Wright, Circuit Judges.

ORDER.

(Filed Oct. 29, 1965.)

The above-entitled case came on for hearing on appellants' motion for injunction and stay pending appeal and pending decision on the merits below, and said motion was argued by counsel. On consideration whereof, and without intimating a view as to the validity of the election, it is

Ordered by the court that the aforesaid motion is denied.

Per Curiam,
C. F., J. A. W.

Dated:

Fahy and Danaher, **Circuit Judges**: If the constitutional contention of appellants attacking the validity of the election has merit this nevertheless does not furnish a basis for this court at this time to use its extraordinary power to enjoin the Board as requested; for the constitutional contention will not be lost should the court's equitable power not be exercised at this time.

C. F., J. A. W.

Wright, **Circuit Judge**, dissenting: For forty years, by agreement between the two unions, the Teamsters Union has represented some of the drivers of the Railway Express Agency and the Railway Clerks Union has represented the balance of the employees. On September 8, 1965, after proceedings before the National Mediation Board, the Board determined that all of the employees of REA were a proper bargaining unit and called an election to be held "in the near future" to determine who should represent the unit.

On September 28, 1965, the Teamsters Union asked the Board for ninety days for electioneering between the delivery to the parties of the names of the eligible voters and the election. On October 8, 1965, the Board denied this request. About the 13th or 14th of October, 1965, the unions were orally advised by the Board mediator that the election would be held by mail and the ballots would be sent out around November 1, 1965. On October 15 the Board gave the unions a list of the names and addresses of some 34,000 persons, purportedly all the employees eligible to vote. On October 22 this list was supplemented with 900 additional names, and yesterday, on October 28, the Board added 600 more names. In the meantime, some 500 letters containing election information addressed by the Teamsters to the eligible voters at the addresses shown on the list furnished by the Board have been returned as undeliverable.

The District Court denied the Teamsters' application for an injunction against the election and other relief, and the case is before this court on application for a stay of the election pending appeal.

The actions of the Board are subject to judicial review only where the Board has acted unconstitutionally, see **Switchmen's Union v. National Mediation Board**, 320 U. S. 297, 301 (1943), or outside its statutory authority, **Leedom v. Kyne**, 358 U. S. 184 (1958). The Teamsters

Union claims, citing, *e. g.*, **Staub v. City of Baxley**, 355 U. S. 313 (1958); **Thomas v. Collins**, 323 U. S. 516 (1945); **Thornhill v. Alabama**, 310 U. S. 88 (1940), that it has been effectively denied its First Amendment right to solicit votes from the employees eligible to vote in the forthcoming election by the time schedule which the Board has set. It particularly urges the fact that it is impossible to obtain a complete and accurate list of the employees eligible to vote by the time the ballots will be sent out and that it will have no real opportunity to contact these employees, scattered as they are throughout the country, by mail or otherwise, and that the employees, consequently, will be unable to make an informed choice. Since the Railway Clerks Union has represented the great majority (32,000 of 35,000) of the employees of the Railway Express Agency over the years, the peremptory action on the part of the Board, according to the Teamsters, not only gives the Railway Clerks an unfair advantage in the electioneering, but makes the outcome of the election a foregone conclusion.

Without attempting to decide the issues presented on appeal on this application for a stay, it appears to me that the Board's action in calling an election without indicating the date until two weeks before the ballots were to be sent out, and then supplying the parties to the election with an incomplete and inaccurate list of employees eligible to vote, presents a substantial constitutional question involving the First Amendment. Under the circumstances, it would be appropriate for this court to stay the election and expedite this appeal. At the very least, the court should order the ballots impounded until the validity of the election has been determined. Without such relief, REA Teamster locals in the various cities may be unnecessarily destroyed and their pension funds adversely affected before this litigation is concluded.

J. A. W.

SUPREME COURT, U. S.

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FILED
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No. 470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and GEORGE LEONIDAS, *Petitioners,*

v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents,* and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS IN OPPOSITION

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington, D. C. 20005
Attorneys for Respondent Brotherhood of Railway and Steamship Clerks

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington, D. C. 20005

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BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court (R. 217) was entered on February 7, 1966, and is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Appendix A of Petition) was entered on May 31, 1966, and is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Did the National Mediation Board violate any requirements of the First and Fifth Amendments to the United States Constitution in denying the motion of petitioners to delay a representation election among employees of REA Express for a period of not less than 90 days after preparation of a list of eligible employees in order that petitioners could conduct an election campaign during such period in circumstances where (a) the representation application involved had been before the Board for some seven months, (b) the petitioners had two months' notice of the representation election and approximately six weeks' notice of the actual date, and (c) the applicable statute provides that the Board shall certify a representative within 30 days of receipt of a representation application?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the First and Fifth Amendments to the United States Constitution and of Section 2, Ninth of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth) involved are set forth in Appendix B of the Petition.

STATEMENT

The litigation concerns a representation election conducted by the National Mediation Board on the property of REA Express pursuant to the provisions of Section 2, Ninth, of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth). The representation

election grew out of an application filed with the National Mediation Board by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (BRC) on March 23, 1965, pursuant to the cited provision of the Railway Labor Act, requesting the Mediation Board to certify the BRC as the duly designated representative of the employees of REA Express, with the exception of those employees represented by the International Association of Machinists (R. 9, 10, 21-29). At the time the application was filed, there was no certification of a representative for any of the employees of REA Express (R. 8, 150). Such representation had existed for a substantial period of time prior thereto pursuant to voluntary recognition by REA Express of the BRC, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT), and the IAM as representatives of various groups of the carrier's employees. In accordance with such voluntary recognition, the BRC represented all of the employees of REA Express with the exception of those vehicle employees located in eight cities and the carrier's mechanics; IBT represented vehicle employees in those eight cities; and the IAM represented mechanics and related employees (R. 6-8). The BRC representation consisted of 29,844 employees of REA Express; the IBT representation consisted of 3222 employees; the IAM representation consisted of 650 employees (R. 6, 62).[1]

This pattern of voluntary split recognition had produced a great deal of dissention over the years to the

[1] BRC represented 7211 vehicle employees, or about 70% of the carrier's employees in such category (R. 62, 63).

detriment of everybody concerned, including the carrier (R. 111-133, 135, 139). BRC therefore finally decided that the public interest required a single representative for all but the small group of mechanics chosen in accordance with the orderly procedures of Section 2, Ninth, of the Railway Labor Act, and accordingly filed its representation application for that purpose (R. 131-133).

Section 2, Ninth, provides, *inter alia,* that the Mediation Board shall investigate a representation dispute and certify the designated and authorized representative of employees involved within 30 days after the invocation of its services. The Federal courts have ruled that this provision is directory rather than mandatory. *System Federation No. 40, Etc.* v. *Virginian Ry. Co.,* 11 F. Supp. 621, 627, aff'd 84 F. 2d 641 (4th Cir.), 300 U.S. 515. The Mediation Board, in accordance with this interpretation, has followed a practice of investigating and resolving representation disputes as promptly as practicable, in the interest of promoting stable labor relations in the transport industries subject to the Railway Labor Act. (See: *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957,* pages 48-49.)

In the present dispute, the IBT filed with the Mediation Board various objections to the BRC application and requested a hearing thereon (R. 33-39). The principal objections of IBT were (1) a claim that the BRC application was barred by a 1937 mediation agreement between BRC, IBT, and REA Express, and (2) a claim that the vehicle employees of REA Express should be set apart as a separate craft or class for representation purposes (R. 30-42). The Mediation

Board held a full public hearing on the IBT objections and on September 8, 1965, issued its determinations, in which it rejected the IBT contentions and directed that a representation election be held in the near future among the employees of REA Express involved (R. 30-72, 136, 137).[2]

In accordance with this procedure, the Mediator assigned by the Board met with the representatives of BRC and IBT on September 21, 1965 (R. 142), to discuss the procedures for the holding of an election, including the status of certain employees left open in the Board's findings of September 8, 1965,[3] the cut-off date for eligibility, an eligibility list, and the type of election, i.e. by mail ballot or by ballot box (R. 200).

On September 23, 1965, the Mediator advised the parties that the list of eligible employees (i.e. those in the occupations established by the Board's determinations as shown by the carrier's records) would be ready on or about October 12, 1965 (R. 94). Also on that date, the Mediator informed counsel for IBT that the representation election would be conducted by the

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[2] The Board's determinations included a separate opinion on an application by IBT under Section 5, Second of the Railway Labor Act (45 U.S.C.A., Section 155, Second) to interpret the meaning or application of the 1937 mediation agreement (R. 136, 137). In that determination, the Mediation Board found that the 1937 mediation agreement did not, as IBT contended, bar the processing of the BRC application (R. 137).

[3] These were so-called "excepted" employees whom the IBT contended were "officials" and thus not subject to the Railway Labor Act (R. 65, 66). BRC resolved this question by withdrawing its request for their inclusion (R. 188).